

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

COMPLAINT OF THE ATTORNEY GENERAL)
TO REDUCE THE ELECTRIC RATES OF) D.T.E. 99-118
FITCHBURG GAS AND ELECTRIC LIGHT)
COMPANY)

FITCHBURG GAS AND ELECTRIC LIGHT COMPANY'S
MOTION FOR A REVISED PROCEDURAL SCHEDULE

Fitchburg Gas and Electric Light Company ("FG&E" or the "Company") hereby requests the Department revise the procedural schedule established by the Department to govern this docket. FG&E has responded to over 90 discovery requests since January 16, 2001. The discovery process is continuing but not necessarily in a manner that recognizes the time and level of analysis required to produce sufficient substantive information to evaluate just and reasonable rates. A revised procedural schedule will provide for an efficient yet equitable adjudication that respects the rights of the parties and is consistent with Department practice and precedent.

I. Background

At the procedural conference conducted on December 19, 2000, the Attorney General asserted that he had established a prima facie case by his G.L. c. 164, sec. 93 ("Section 93") complaint and that little additional evidence would be necessary for the Department to render a decision in this matter. Accordingly, the Department issued an expedited procedural schedule that put the burden of proof squarely on the Attorney General. See Attachment A (Jan. 5, 2001 Procedural Schedule in D.T.E. 99-118). Under the Procedural Schedule, the Attorney General must prefile testimony by February 9; FG&E must respond with prefiled testimony on March 2, 2001. The discovery period extends from January 5 through March 16, 2001, with the parties required to respond to information requests in five (5) business days. The Hearing Officer also allowed for the Attorney General to respond to FG&E's Answer with a summary judgment motion and required the Company to respond within ten days.

On January 8, 2001, the Attorney General issued 89 information requests as his first set of information requests. Attachment B. On January 9, 2001, the Department issued 11 information requests. On January 10, 2001, the Attorney General issued his second set of information requests. Attachment C. This second set contained an additional 14 multi-part information requests, asking for extensive cost-of-service analysis and voluminous data for multiple years, spanning 1991 through 2000.

Beginning January 16, FG&E responded to all of the Department's discovery requests and the vast majority of the Attorney General's requests. On January 18, 2001, FG&E filed with the Attorney General its objections to nine of his requests (AG 2-6 through 2-14). The Company also filed with the Department a Motion to Define Scope, seeking a determination from the Department on the breadth of its investigation in light of the unlimited scope reflected in the Attorney General's discovery requests.

On January 25, the Attorney General filed an Opposition to FG&E's Motion to Define Scope and Cross Motion to Compel Discovery ("Cross Motion"). In direct contravention to his prior averment that "not much evidence" would be needed, the Attorney General asserted in his Cross Motion that the scope of the proceeding was virtually limitless and that he needed extensive data before filing his initial testimony. The Attorney General also retreated from a December 19, 2000 statement at the procedural conference that he intended to file for summary judgment.⁽¹⁾ In the Cross Motion, the Attorney General requested that the Department order FG&E to respond to each and every one of his requests within five days, or that the Department should take the extraordinary measure of excluding any such responses from the record in this proceeding.

On February 1, 2001, FG&E opposed the Attorney General's Cross Motion and FG&E indicated to the Department in its Opposition that it would file this Motion to Revise the Procedural Schedule.

II. Due Process Requires That All Parties be Afforded a Reasonable

Opportunity to Prepare and Present Evidence

If the scope of this proceeding is to focus narrowly on the Attorney General's complaint of over-earnings and inadequate depreciation accruals, the existing procedural schedule may be adequate. If, however, this proceeding is to be expanded into a G.L. c. 164, sec. 94 ("Section 94")-type base rate investigation, as suggested by the breadth of the Attorney General's discovery and his most recent pleadings, the existing procedural schedule does not provide a reasonable opportunity for the Company to prepare and present evidence, and should be modified. See G.L. c. 30A §11(1) (parties must be afforded sufficient notice and full opportunity to prepare and present evidence); see also, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The precedent cited by the Attorney General for a Section 93 action (at the procedural conference held December 19, 2000) involves a case initiated by an August 1987 complaint of the City of Boston relative to Boston Gas Company's rates and charges. See Boston Gas Co., D.P.U. 88-67, p.1. In November, 1987, the Department adopted, at the behest of several parties, a revised procedure allowing Boston Gas to file a Section 94 petition, in lieu of the Section 93 action. That proceeding was bifurcated into two phases (Phase I and Phase II). Phase I, filed in March 1988, addressed Boston Gas' revenue requirement and rate design for residential customers. Phase II, filed in November 1988, proposed a new rate design for commercial and industrial customers. Boston Gas Co., D.P.U. 88-67 (Phase II), p.1 (May 31, 1989).

In Boston Gas, the Department approved a procedural schedule that allowed Boston Gas over 3½ months to prepare and file its Phase I request. The prepared Boston Gas presentation included testimony from eight company witnesses and four consulting experts on, inter alia, cost of service, depreciation, rate of return, gas supply, marginal costs, allocated cost of service, rate design, conservation and load management, and cast iron pipe replacement. Boston Gas Co., D.P.U. 88-67 (Phase I), p. 5. Hearings in Phase I, alone, included 34 days of evidentiary proceedings. Id. at 4.

The Boston Gas procedural precedent demonstrates that if the scope of the instant matter is the same as a Section 94 case, as the Attorney General now contends, the existing procedural schedule is clearly inadequate. It appears that the Attorney General seeks to deny FG&E the fair and equitable amount of time reasonably necessary for the preparation and presentation of evidence. He is doing this by asking the Department to require FG&E to produce its cost of service and pro forma adjustments within five (5) days or to exclude any such responses. Granting this request would violate FG&E's due process. Due process requires that notice of issues must be provided in such a way to allow a party to appear and defend itself. See, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). It is painfully clear that the few weeks time allotted both parties for preparation of cost of service and revenue requirements analyses is inadequate. If the Department is to allow a broad scope of discovery and investigation, it must amend its procedural schedule.

III. The Reverse Rate Case Being Pursued by the Attorney General is

Inefficient, Duplicative and Inequitable

It is FG&E's position that the Department should either (1) limit the scope of this proceeding or (2) revise its procedural schedule, in order to ensure an efficient and equitable process. If adhered to, the current schedule and the Attorney General's onerous discovery will -- in all likelihood -- result in duplicative filings and wasted resources by each of the parties.

The Attorney General has asked FG&E to provide, *in a totally unreasonable time frame*, a cost of service analysis that typically takes months -- rather than days -- to produce. Under the Procedural Schedule, the Attorney General must then prefile testimony that based upon the requests in Attachment B hereto can be expected to present some ad hoc cost of service and revenue requirement analysis. FG&E must then conduct discovery and prefile its testimony in critique.⁽²⁾ This expedited procedure and incomplete analysis may, *but most likely will not*, provide the Department with sufficient evidence to adjust the Company's rates.

The appropriate response of the Department at that time will be to either dismiss the case or require FG&E to file a base rate proceeding. Even if the Department were able to find a basis to order a rate decrease at that time, the Company will still need to take the time to perform a full cost of service analysis and may very well find it must file for a Section 94 increase for *both* its gas and electric divisions. The Company believes this scenario is both inefficient, potentially inequitable, and a waste of resources for all parties.

IV. The Department Should Revise the Procedural Schedule to Provide

for a Fair and Meaningful Review of FG&E's Costs and Revenues

FG&E recognizes that, unlike Boston Gas, the participants here have not proposed to the Department a procedural schedule that is agreed between the parties, though such discussions have been pursued. In absence of such an agreement, FG&E proposes the following revised procedural schedule to allow for a full and fair review of FG&E's costs and revenues.

- The Company will prepare and file a cost of service study for its electric division based on a calendar year 2000 test year by no later than April 15, 2001.

- Discovery by all parties will be suspended until, and will resume upon, filing of the Company's cost of service.

- The Attorney General may file testimony by June 1, 2000

- Hearings will be conducted between June 15 and July 1, if the Attorney General does not present a witness, and between July 1 and July 13 if the Attorney General presents a witness.

- Initial Brief of the Attorney General - July 27

- Initial Brief of FG&E/Intervenors - August 3
- Reply Briefs of the Attorney General - August 10
- Reply Briefs of FG&E/Intervenor - August 17
- Department Order by October 1, 2000

V. Conclusion

FG&E avers that this schedule provides for (1) a full and fair consideration of the Attorney General's Section 93 Complaint, (2) the complete notice of and defense of all issues as required by due process, and (3) a comprehensive review of the Company's electric division cost and revenues.

WHEREFORE, Fitchburg Gas and Electric Light Company respectfully requests that the Department of Telecommunications and Energy grant its Motion for a Revised Procedural Schedule and provide such other relief as it may deem just and reasonable.

Respectfully submitted,

Fitchburg Gas and Electric Light Company

By its Attorneys,

Scott J. Mueller

Patricia M. French

LeBoeuf, Lamb, Greene & MacRae, L.L.P.

260 Franklin Street

Boston, MA 02110-3173

(617) 439-9500 (tel)

(617) 439-0341 (fax)

Dated: February 6, 2001

B67814

CERTIFICATION

I, Patricia M. French, certify the within was sent to each of the individuals on the service list on file with the Secretary of the Department of Telecommunications and Energy.

Dated at Boston, Massachusetts, this ____ day of February, 2001.

Scott J. Mueller

1.

¹ Contrary to the Attorney General's assertion that the Hearing Officer denied his request to file for summary judgment, the procedural schedule explicitly allows for such a request. If the Attorney General, as he claims, has already made a sufficient case justifying an immediate rate reduction, a summary judgment motion is appropriate.

2.

² As indicated at the December 19, 2000 prehearing conference, and particularly in light of the extensive discovery effort already required, FG&E is unlikely to be able to file a full cost of service study in rebuttal to the Attorney General's case in the time allotted.